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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 345

PAUL WILSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Sixth Circuit
and
BRIEF IN SUPPORT THEREOF

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---

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul Wilson, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on the 23rd day of July, 1945, affirming his conviction of May 16, 1944, respectfully shows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Paul Wilson was indicted under six counts in the District Court for the Eastern District of Kentucky. Record, page 11. He was tried before the Court and found guilty on counts 1, 3, 4 and 6, and not guilty on counts 2 and 5.

Counts 1 and 6 of the indictment charge a violation of the revenue statute in that, "on or about the 14th day of

February, 1944, and between said date and the 22nd day of February, 1944, * * * one Paul Wilson, being then and there a wholesale liquor dealer, that is engaged in the sale and disposition of distilled spirits in quantities of more than five wine gallons to the same person at the same time, said place of business being located at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully, wilfully and feloniously fail to pay the special tax required to be paid by wholesale liquor dealers under the provisions of Section 3250 of the Internal Revenue Code."

And Count 6 sets out that the said Paul Wilson at said place of business at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: two cases of "Rocking Chair" whiskey for the sum of $144.00, and one case of "Spring Hill" whiskey for the sum of $75.00, or a total of $219.00, which price was in excess of the maximum price fixed and permitted by law, namely $108.00, said sale being in violation of the Emergency Price Control Act of 1942, and Regulation No. 445. Record, page 15.

The 3rd and 4th Counts charge a violation of the Regulation of the Office of Price Administration, in that said Paul Wilson at his place of business at Sharp's Tourist Court, Middlesboro, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: one case of "Paul Jones" whiskey for the sum of $90.00, which price was in excess of the maximum price fixed and permitted by law, namely $45.90, which sale was in violation of the provisions of the Emergency Price Control Act of 1942, and Regulation 445 hereinabove referred to.

Count No. 4 sets out that "the said Paul Wilson, at his place of business at 'Paul's Place,' Wallsend, Bell County, Kentucky, did unlawfully sell and deliver to Robert Carter Barrett a quantity of distilled spirits, to-wit: one case of 'Paul Jones' whiskey for the sum of $90.00, which price was in excess of the maximum price fixed and permitted by law, namely, $45.90, which sale was in violation of the Emergency Price Control Act of 1942 and Regulation No. 445 hereinbefore referred to.

Your petitioner, Paul Wilson, denied all of the averments in the indictment, but the Court in an oral opinion, Record, page 169, found the petitioner guilty on counts 1, 3, 4 and 6, and on the 29th day of May, 1944, sentenced the petitioner on Count No. 1 to two years imprisonment and a fine of $2,000.00, and on Count No. 6 to one year imprisonment, but the sentences on both of these counts were probated. On Count No. 3, petitioner was sentenced to one year imprisonment and fined $5,000.00 and on Count No. 4 petitioner was sentenced to one year imprisonment and fined $5,000.00, and it was ordered that these sentences should be served consecutively.

Your petitioner appealed from the decision of the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, and on June 11, 1945 the Circuit Court of Appeals rendered an opinion affirming the judgment of the District Court and on the same day judgment was rendered in accordance therewith. Record, page 181.

Petition for rehearing was duly filed in the United States Circuit Court of Appeals on the 27th day of June, 1945, Record, page 189, and on July 23, 1945, said petition for rehearing was denied and the final judgment entered therein. Record, page 209.

II

JURISDICTION

(1) The date of the judgment or decree to be reviewed is July 23, 1945, and this petition is filed within the time provided by law.

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 347 of Title 328 of the United States Code, (Acts of March 3, 1891, Chapter 517. Section 6, 26 Stat. 828; March 3, 1911, ch. 231, sec. 240, 36 Stat. 1157; February 13, 1925, ch. 229, sec. 1, 43 Stat. 938; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

(3) Section 204 (d) 50 U. S. C. A. provides that jurisdiction to determine the validity of the Regulation Number 445 of the Emergency Price Control Act of 1942, here involved, is an exclusive jurisdiction of the Emergency Court of Appeals or the Supreme Court and it further provides that no Court, federal, state, or territorial shall have jurisdiction to consider the validity of any such regulation.

The constitutionality of Regulation number 445 is still an open question. See *Jatros* v. *Bowles,* C. C. A. 6, decided June 6, 1944, 143 Federal Second, 453; *U. S.* v. *Renken,* 55 Fed. Supp. 1; *Yakus* v. *U. S.,* 321 U. S. 414; 64 S. Ct., 660, 88 L. Ed. 653.

III

SPECIFICATION OF ERRORS

(1) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the petitioner was a wholesale liquor dealer within the meaning of the Act.

(2) The United States Circuit Court of Appeals erred in affirming the judgment of the District Court that the

petitioner was guilty of violating Regulation 445 of the Office of Price Administration. The Circuit Court of Appeals failed to take judicial notice of the Regulations, which prior to the purported commission of the acts complained of, were printed and published in the Federal Register and all Courts were charged with judicial knowledge thereof, and the said Court failed to note that the indictment in this case was drawn and the proof offered on Office of Price Administration Regulations which were first published on May 2, 1944 and made effective May 8, 1944, and that the offense with which petitioner is charged was committed in the month of February, 1944, and therefore, petitioner was, in effect, tried on an ex post facto regulation of the Office of Price Administration, which is a denial of the Constitutional rights of this petitioner and is contrary to the decisions of this Court as hereinafter set out.

(3) The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the record sustained the opinion of the District Court in adjudging the petitioner guilty and sentencing him under Counts 1, 3, 4 and 6.

(4) The Court erred in failing to reverse Counts 1 and 6 in that the record shows that the petitioner was convicted under Counts 1 and 6 for the alleged sale of two cases of "Rocking Chair" whiskey and one case of "Spring Hill" whiskey to Robert C. Barrett when, in fact, said whiskey was sold by one Luther Edwin Floyd, Record, page 28, and that said Luther Edwin Floyd was indicted for the sale of the self same whiskey on May 8, 1944 and on said indictment pleaded guilty and served a sentence in the Federal penitentiary, that said fact was set out in a supple-

mental motion and grounds for a new trial filed May 22, 1944. Record, page 26.

That a great injustice has been done this petitioner, and that Honorable Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, realized that an injustice was being done this petitioner, as shown by the affidavit of said Claude P. Stephens, Record page 179.

IV

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. The constitutionality of Maximum Price Regulation 445 dealing with intoxicating liquors in States that have, by appropriate legislation, availed themselves of the provisions of section 2 of the 21st Amendment is of such importance to a large number of the States that this Honorable Court should declare and define the rights of the citizens of the various States thereunder.

B. The 21st Amendment to the Constitution of the United States returned the regulation of liquor to the various States.

C. Regulation 445 of the Office of Price Administration, dealing with intoxicating liquors, violates the 21st Amendment to the Constitution of the United States. See *Carter* v. *Virginia*, 321 U. S. 131; *Indianapolis Brewing Company* v. *Liquor Commission*, 305 U. S. 191; *Finch and Company* v. *McKittrick*, 305 U. S. 395; *Mahone* v. *Triner Corp*, 304 U. S., 401; *Ziffren, Inc.* v. *Reeves*, 308 U. S. 132.

D. The District Court adjudged the petitioner was guilty of engaging in the wholesale whiskey business under proof of a single transaction which involved more than five wine gallons, which judgment should have been reversed by the Circuit Court of Appeals.

(2) The Circuit Court of Appeals erred in failing to reverse the District Court on the judgment on Counts 3 and 4, which charged a violation of Maximum Price Regulation 445, which indictments were drawn under Amendment 15 to MPR 445, which amendment was not adopted until May 8, 1944, whereas the offense for which petitioner was convicted was committed in February, 1944. In effect, your petitioner was indicted and tried under a Regulation which was not in effect at the time of the commission of the offense. This Regulation is fully discussed in the brief attached hereto, but the failure of the Circuit Court of Appeals and of the District Court to consider your petitioner's assignment of this error is a denial of the constitutional rights of this petitioner and is the equivalent of trying this petitioner upon an ex post facto regulation, which decision is in conflict with the applicable decisions of this Court on the question of ex post facto laws. See *Calder* v. *Bull*, 1 Law Ed. 648; *Burger* v. *Salmon*, 24 Law Ed., 1104; *Thompson* v. *Utah*, 42 Law Ed. 1061; *Cisson* v. *U. S.*, 37 F. (2) 330; *U. S.* v. *Eight Packages & Cask of Drugs*, 5 F. (2) 971.

(3) Your petitioner was convicted on Counts 1 and 6 for the sale of two cases of "Rocking Chair" whiskey and one case of "Spring Hill" whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney, as aforesaid, recognizes that this petitioner has been done an injustice and that by his affidavit,

Record, page 179, the said United States Attorney was willing to reduce the sentence in this case, but this petitioner was not willing to agree to a sentence of twelve months in jail and $3000.00 fine which the United States Attorney states in his affidavit he was willing to recommend to the Court, but this petitioner, relying on his own innocence, refused this modified sentence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9815, Paul Wilson, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and your petitioner further prays that the certified copy of the record and the proceedings of said United States Circuit Court of Appeals filed with this petition may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Dated August 18, 1945.

PAUL WILSON, *Petitioner,*

By JOHN Y. BROWN,
Counsel for Petitioner.

Of Counsel:
HOBART F. ATKINS,
CLEON K. CALVERT.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURTS BELOW

The opinion of the District Court is to be found in the official transcript of record on page 169.

The opinion of the Circuit Court of Appeals for the Sixth Circuit will be found in the official transcript of record on page 182.

JURISDICTIONAL GROUNDS

Statement of grounds upon which the jurisdiction of this Court is invoked is set out in the petition to which this brief is attached.

STATEMENT OF CASE

Statement of the case containing all that is material to the questions presented is set out in the petition to which this brief is attached.

SPECIFICATION OF ERRORS

Specification of errors are set out in the petition, under heading III, to which this brief is attached.

SUMMARY OF ARGUMENT

A. A consideration of all the evidence compels the conclusion that petitioner had applied for a license to operate Sharp's Tourist Court which license had not been granted and he was not in control of the business; that he didn't personally commit the offense, if an offense was committed at Wallsend Tourist Place, and that it was entirely insufficient to support a judgment and conviction in a criminal case according to the well-defined rules of criminal law.

B. By taking judicial knowledge of the Federal Register, the Honorable Court should have supported the petitioner's position that Regulation 445 as it existed at the time of this supposed offense did not fix and establish a ceiling price or a price that petitioner was allowed to pay for the whiskey involved, and thus he suffered an injustice which constitutes a reversible error for which the cause should be remanded to the District Court for a trial de novo.

C. Regulation 445 dealing with intoxicating liquors violates the 21st Amendment to the Constitution and that the Federal Government may not rely upon either the due process clause, commerce clause or the equal protection clause of the Constitution to act in the liquor field.

D. Your petitioner was convicted on counts 1 and 6 for the sale of two cases of Rocking Chair whiskey and one case of Spring Hill whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said

whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney has recognized that this petitioner has been done an injustice.

ARGUMENT

A.

A consideration of all of the evidence compels the conclusion that Petitioner had applied for a license to operate Sharp's Tourist Court which license had not been granted and he therefore was not in control of the business; that he did not personally commit the offense, if an offense was committed at Wallsend Tourist Place, and that it was entirely insufficient to support a judgment and conviction in a criminal case according to the well-defined rules of criminal law.

It should be kept in mind that the offense for which the Petitioner stands convicted in the first and sixth counts is defined under section 3250 of the United States Code which provides in general . . . Wholesale dealers in liquors shall pay a special tax of $110.00.

This is an occupational tax, that is, it is a tax to be paid by persons who are engaged in the wholesale whiskey business.

The penalty for a violation of the aforesaid section is defined in section 3253, Title 26 of the Internal Revenue Code and is a follows:

Penalties and Forfeitures for nonpayment of special tax.—Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in

malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States. (53 Stat. 391).

The federal liquor license statute represents a mode of imposing taxes on such business, so that before there can be a conviction there must be evidence of an intention of defrauding the Government of its revenue. It was so held in *U. S.* v. *Jackson* (CCBA) Federal case 154, 55; 1 Hughes, 531.

It has likewise been held that an isolated sale at wholesale did not make the seller a wholesaler. *U. S.* v. *Feigelstock* (CCNY) Federal case 150, 84, 14 Blatchf, 321.

Title 26, section 3272—Returns—(a) Time for filing.—It shall be the duty of the special taxpayers to render their returns with remittances to the collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive such returns, duly signed and verified, together with the remittances, not later than the last day of the month, except in cases of sickness or absence, as provided for in section 3634.

Section 3271 (a) of the Internal Revenue Code pro-

viding that a person shall not engage in a trade or business making him liable to an operation tax until he has paid the privilege tax in the manner provided, and the above section giving him until the last day of the month in which the operation tax liability commences to file his return and pay the operation tax must be construed together, and while the tax liability accrues on the commencement of business. The taxpayer has until the last day of the month in which the tax liability commences, to file his return and pay the tax. This is the construction placed upon these statutes by the Circuit Court of Appeals for the 10th Circuit. See *Farmer* v. *U. S.*, 128 Federal (2d) 970.

Section 3280, Title 26 of the U. S. Code provides:

Liability in case of death or change of location. (a) Requirements.—When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators or other legal representatives, may occupy the house or premises, and in like manner carry on, for the residue of the term for which the tax is paid, the same trade or business as the deceased before carried on, in the same house and upon the same premises, without the payment of any additional tax. And when any person removes from the house or premises for which any trade or business was taxed to any other place, he may carry on the trade or business specified in the collector's register at the place to which he removes, without the payment of any additional tax; Provided, That all cases of death, change, or removal, as aforesaid, with the name of the successor to any person deceased, or of the person making such change or removal, shall be registered with the collector, under regulations to be prescribed by the Commissioner.

B.

By taking judicial knowledge of the Federal Register, the Honorable Court should have supported the Petitioner's position that Regulation 445 as it existed at the time of this supposed offense did not fix and establish a ceiling price or a price that Petitioner was allowed to pay for the whiskey involved, and thus, he suffered an injustice which constitutes a reversible error for which the cause should be remanded to the District Court for a trial de novo.

It is our position that the law of this case was to be found in the Federal Register published Wednesday August 11th, 1943, insofar as counts 3 and 4 of the indictment are concerned, and that there was no other law or rules of law that could be applied. (See Appendix, Page 26.)

Beginning on Page 11161, 8 Federal Register, which, incidentally, is the citation or regulation set out in the indictment in this cause, the pertinent part of said Regulation is Article 5, titled, Maximum Prices for sales of packaged distilled spirits and packaged wine by wholesalers, retailers, monopoly states and primary distributing agents. (See Appendix, Page 34.)

We think, clearly, had the Honorable Circuit Court of Appeals for the Sixth Circuit taken judicial knowledge as the statute provides, of this publication in the Federal Register, they would have concluded that the Petitioner had been tried for a violation of a Regulation which was not in existence at the time of the alleged commission of the purported offense and that there was not in existence a formula, etc., as is detailed in the proof and thus, it is that we insist that the judgment of the Circuit Court of Appeals for the Sixth Circuit is erroneous.

By an observation of the record in this cause, it can be seen that the Government and the Honorable Circuit Court of Appeals for the Sixth Circuit determined this

cause by reason of a directive issued by the Office of Price Administration, 4216, Advance Release to the afternoon papers on May 2, 1944, which did in fact set up a formula or formulas and fix the buyer's as well as the seller's pricing. Hence, we respectfully submit that if there is a conviction in this cause it could only be sustained by reason of the regulations which were not in effect at the time of the purported violation which, we think is contrary to the spirit and letter of the law, and the Petitioner would stand committed on a conviction of an offense created by an ex post facto regulation.

Under MPR 445 only the formula for determining the sale price of whiskey was set up and under this regulation a practice had grown up in the industry of paying finders' fees to persons locating whiskey for the retailers. The reasons for Amendment 15 to MPR 445, the OPA bulletin issued on May 2, 1944 and published by the OPA states, and are set out in part, as follows: (For full publication see Record, page 191.)

> "(2) Restrictions were made on the use of finder's and buyer's brokers, allegedly employed to locate sources of supply for anxious buyers. Today's action provides that the broker or agent must be considered the agent of the seller and not of the buyer and that the amount which the buyer pays to the broker plus that which he pays to the seller must not exceed the seller's ceiling price, plus actual transportation charges paid by the agent. This provision will, OPA believes, avoid the tendency, prevalent because of shortage conditions, to shift the selling expense from the seller, whose maximum price includes an allowance for such expense to the buyer."

It can readily be seen, therefore, that the indictment in this case was based on Amendment 15, which did not allow the retailers to charge finder's fees or any expenses except

that set forth in the formula in Amendment 15 to MPR 445, but this amendment was made effective on May 8, 1944, and the offense which the petitioner is charged with having committed was committed in the month of February, 1944, and his conviction under this Amendment 15 is a conviction under an ex post facto regulation.

C.

Regulation 445, dealing with intoxicating liquors violates the 21st Amendment to the Constitution and the Federal Government may not rely upon either the due process clause, commerce clause or the equal protection clause of the Constitution to act in the liquor field. Carter v. Virginia, 321 U. S. 131; Indianapolis Brewing Company v. Liquor Commission, 305 U. S. 191; Finch and Company v. McKittrick, 305 U. S. 395; Mahone v. Triner Corp., 304 U. S. 401; Ziffren, Inc. v. Reeves, 308 U. S. 132.

The State of Kentucky, by appropriate legislation has established a state alcoholic beverage control board. The said board is vested with complete and absolute power to do any and all things necessary to supervise and control the manufacture and sale of alcoholic beverages. Thus, the state has availed itself of the right given it under the 21st Amendment to the Constitution to control the liquor traffic. This matter was before the Supreme Court of the United States in *Ziffrin* v. *Reeves*, 308 U. S. 132; 60 S. Ct. 163, 84 L. Ed. 129. This law is codified in the revised statutes of the State of Kentucky from sections 241010 to 244099.

The alcoholic beverage control law as the the same is referred to in the statute includes the fair trade provision thereof, and in *Ziffrin* v. *Reeves*, supra, this Honorable Court held that the State Legislature under its police power may fix minimum prices on the sale of commodities whether or not affected with a public interest.

Innumerable methods have been devised by legislatures of the several states, and some by the national Congress, in an attempt to properly regulate the liquor traffic • • • and, we can not say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject, or that it is arbitrary or discriminatory and not based on substantial grounds.

In the case of *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 60 S. C. 163, the Kentucky Alcoholic Beverage Control Law was before the Court and the constitutionality of it was sustained. This Act practically covers the entire field with reference to the traffic in intoxicating liquors and we believe that in this opinion the Supreme Court in construing the 21st Amendment vested solely in the states, the rights affecting the liquor traffic as a part of its inherent police power.

The opinion in this cause is strictly in accordance with the opinion of *U. S.* v. *Lanza*, 260 U. S. 377; 43 S. Ct. 141. In the *Lanza* case this Honorable Court held, under the Tenth Amendment to the Constitution, this power, that is the power that was transferred to the Federal Government by the 18th Amendment, originally belonged to the states, reserved to them by the 10th Amendment.

The National Congress after the enactment of the 21st Amendment, legislated in certain respects with reference to intoxicating liquors, that is, to collect the revenue and to aid states that desire to remain dry in the enforcement of the State's statutes, but not otherwise, it being the national view that the people by the 21st Amendment to the Constitution desired that the right to control the liquor traffic was local and belonged to the different states, under the police power of the states, and that the national

government did not possess police power with respect thereto.

Title 27, section 121 of Federal Code Annotated, provides under *State Statutes as Operative On Termination of Transportation; Original Packages*: that, "All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquids had been produced in such state or territory and shall not be exempted therefrom by reason of being introduced therein in original packages or otherwise". (The Act of August 8, 1890, Chapt. 728, 26 Stat., 313.) This act is commonly known as the Wilson Bill and was held constitutional in *Wilkerson* v. *Rahrer*, 140 U. S. 545.

The National Congress since the enactment of the 21st Amendment has refrained from any legislation pertaining to the control of the liquor traffic. The only law passed by Congress pertaining thereto is the Federal Alcohol Administration Act of August 29th, 1935. Chapt. 814, section 1, 49 stat., 977, provided for the organization of the division of the Treasury Department. The purpose of the said Act, (sec. 203) was to effectively regulate interstate and foreign commerce in distilled spirits, wine and malt beverages, to enforce the 21st Amendment, and to protect the revenue and to enforce the postal laws with reference to distilled spirits, wine and malt beverages.

It is our position that the 21st Amendment left Congress only with such powers to regulate the liquor traffic

as might enable it to assist the States in enforcing their own liquor laws. We think that the opinions of this Honorable Court clearly indicate such to be the law. As said by Mr. Justice Black in the case of *Carter* v. *Virginia*, 321, U. S. 131, "The precise amount of power (21st Amendment) as left in Congress to regulate liquor under the commerce clause, has not been marked out by decisions. This much, however, has been decided that it is a local and not a national right and the regulation of the liquor traffic is now vested exclusively in the states. This is the general constitutional policy.

There is no basis upon which the regulation in question can be justified either as an aid to the State or as a regulation for revenue, the State of Kentucky itself having established a price control in its law. Any effort on the part of the National Government to enter into this field would be an invasion of the rights of the state, a right which was taken away when the 18th Amendment was repealed.

Is is true that the War Powers Acts are extensive and far-reaching, but the Constitution and Constitutional limitations are applicable. *Hamilton* v. *Kentucky Distillery Co.*, 251 U. S. 146; 40 S. Ct. 106. Thus, we think Maximum Price Regulation 445 is null and void because under the Constitution, the National Government did not have a right to exercise this control over intoxicating liquors. We do not think that whiskey and distilled spirits are commodities within the meaning of the acts of Congress. The Congress required in the issuance or promulgation in any resolution that the Administrator shall ascertain prevailing prices between October 1st and October 15th. There is nothing in the Federal Register affirming that this was done.

The 18th Amendment and the construction by the Courts of the different provisions of the Amendment afford us the privilege of learning, to some extent, what powers were withdrawn from the Federal Government by the 21st Amendment. It is true that in the opinion by Mr. Chief Justice White, at a time when various dignified protests were being made and presented that however determined, it is clear that the Honorable Supreme Court determined in its opinion that the American people have a right to amend their Constitution in any way they see fit and that the people of a sovereign state have a wider power to make an amendment to the Constitution than is set out in the Federal Constitution as the people of a sovereign state have the full police power whereas the states granted to the Federal Government under the Constitution, only certain limited authorities. This is true notwithstanding that it overlooks the broad ground taken by Chief Justice Marshall that the Federal Government is the Government of a great nation and can do anything that any Government can do and the American people have a right to prescribe for themselves not only any Government they desire, but any laws and rules of conduct the invocation of which they believe will result in the general good. The 18th Amendment gave to the National Congress power to control the liquor traffic.

Before the enactment of the 18th Amendment, Congress had no power to regulate the liquor traffic as such. This was the opinion of this Honorable Court in *Schnitzler* v. *Yellowley*, 290 Federal 849, and *Millstone* v. *Yellowley*, 290 Federal 855.

It is a fundamental principle of Constitutional Government that if a Constitutional Amendment is in conflict with an older provision so that the two cannot be recon-

ciled or construed together, clearly the older one must yield. Hence, the 18th Amendment in part superseded the Fifth Amendment. *Corneli* v. *Moore,* 267 Federal, 456. See *S. C. on appeal* 253 U. S. 350, 40: S. Ct. Rept. 486. Hence, if there is a conflict or if the 18th Amendment is to be considered at all it would have to be considered as a superseded amendment and all power therein vested would turn back to the state from which it came for if so it be that the power so conferred upon Congress by the 21st Amendment had the effect to wipe out the Constitutional rights theretofore deemed vested and inviolable the situation may be regrettable, but it cannot be helped. The Constitution, when amended, must be construed as a whole. If later amendments destroy, impinge upon, modify or wipe out an old provision, the newer provision must stand because it is the last utterance of the people who reserve to themselves the right to change the organic laws in th way provided by the organic law itself. Of course, the Constitution, when amended, should, if possible, be so construed as to give effect to both the old and new parts.

So to our mind it is utterly futile to present that the National Government at this time possesses any power to regulate or legislate directly with reference to intoxicating liquor within the states other than to assist the states and to protect the revenue. Any other power would, in effect be tantamount to saying that the constitution can not be amended to express the will of the people. True, the people may be mistaken; but under our form of Government they are sovereign and the majority rules. When they change the organic law in the solemn manner provided therein, this change must stand and be fairly construed and honestly followed until it in turn shall be again

changed in due and legal form. Faris, J. in *Fallstaff Corp.* v. *Allen*, 278, Federal 643.

The state in enforcing and applying its law is not ordinarily exerting a power derived from the Constitution or its amendments and is, therefore, not acting under the authority of the United States. However, the Supreme Court of the United States will lend great persuasiveness to the state courts in the interpretation of a state statute, it being ultimately a state question, the final decision which rests with the Court of the State. See *Hebert* v. *Louisiana*, 71 L. Ed.

The authority granted in authorizing by licensing, taxing or permitting, confers no authority upon the citizen with reference to State law. See *Hazel Drug Co.* v. *Wilmer*, 131 Penna., 286. The 21st Amendment clearly returned all the rights to the states.

It is, therefore, the contention of the petitioner that the State of Kentucky regulates the sale of whiskey and that this is a right and authority returned by the 21st Amendment to the Constitution to the State of Kentucky, and that the Federal Government has no authority to interfere with the State in its regulation of the liquor industry except insofar as the same pertains to the revenue of the Federal Government.

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Your Petitioner was convicted on Counts 1 and 6 for the sale of two cases of Rocking Chair whiskey and one case of Spring Hill whiskey when, in fact, said whiskey was sold to Robert Carter Barrett by one Luther Floyd. The said Floyd was indicted for the sale of said whiskey and on the indictment pleaded guilty and has since served a sentence for said offense. That to convict this Petitioner on a charge to which another has pleaded guilty and served time is an inexcusable injustice which is contrary to every concept of right, and that the United States Attorney, as aforesaid, recognizes that this Petitioner has been done an injustice.

Count No. 1, which charges that petitioner carried on a wholesale liquor business without paying the special tax required, depended upon the evidence which supports Count No. 6. Your petitioner respectfully submits that after his trial and conviction on these two counts he received information that one Luther Edwin Floyd was also indicted and had been convicted for selling the self-same cases of whiskey at the same time to the same Robert Carter Barrett, that the indictment of Luther Edwin Floyd is set out in the transcript of record, page 28, that the said Luther Edwin Floyd pleaded guilty to said indictment and took a penitentiary sentence which he has since served, that this petitioner is innocent of the charges set forth in Counts No. 1 and No. 6 of said indictment and that the testimony of said Robert Carter Barrett against this petitioner is untrue, and that this petitioner has suffered a gross and grave injustice by reason of the failure of the Circuit Court of Appeals to reverse the lower Court on Counts 1 and 6 of said indictment.

CONCLUSION

Your petitioner respectfully states:

That the United States Circuit Court of Appeals failed to take judicial notice of Maximum Price Regulation 445 and the fact that the indictment in this case and the evidence offered was under Amendment 15 to said Regulation, which was not made effective until May 8, 1944, whereas the offense charged if committed, was committed in the month of February, 1944. In the month of February there was no restricted schedule to which the buyer was bound, but the only ceiling was his selling ceiling, whereas under the new amendment there was a ceiling on his purchases. To convict this petitioner on a regulation which was not yet in effect at the time he was charged with an offense is tantamount to a conviction under an ex post facto regulation and is contrary to the decisions of this Court as hereinabove mentioned.

Your petitioner further submits that the State of Kentucky has a price control act and that under the 21st Amendment to the Constitution of the United States the control of liquor, except insofar as it pertains to interstate shipments and revenue of the Federal Government, was returned to the States and that the Federal Government has no authority to interfere with the State price structure.

Your petitioner further respectfully presents that he has been done a gross injustice in the trial below. That this injustice is recognized by the Honorable Claude P. Stephens, United States Attorney for the Eastern District of Kentucky, and that in the record there is the affidavit of said Claude P. Stephens, Record, page 179, in which he states that he had suggested to the District Court that he would recommend that the sentences herein be modified

and that a new sentence be imposed and that sentence be for twelve months in jail and a fine of $3,000.00 in lieu of the sentences theretofore imposed.

Your petitioner, therefore, respectfully submits that to relieve this petitioner of the injustices obviously imposed upon him in this case, this Court ought in the interest of justice, to reverse the judgment herein and to return this case to the District Court for a new trial.

Respectfully submitted,

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Lexington, Kentucky,
Counsel for Petitioner.

HOBART F. ATKINS,
CLEON CALVERT,
Knoxville, Tennessee,
Of Counsel.

APPENDIX

FEDERAL REGISTER

Title 44, section 305 of the Federal Code Annotated provides:

Federal Register; contents; comments or news items excluded. —(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress; Provided, That for the purposes of the Act (chapter) every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing, there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register. (July 26, 1935, c. 417, sec. 5, 49 Stat. 501.)

EXECUTIVE ORDER NO. 7298.

Regulations Governing the Preparation, Presentation, Filing and Distribution of Executive Orders and Proclamations.

By virtue of and pursuant to the authority vested in me by the Federal Register Act, approved July 26, 1935,

(49 Stat. 500), and as President of the United States, I hereby prescribe the following regulations governing the preparation, presentation, filing and distribution of Executive orders and proclamations:

1. Proposed Executive order and proclamation shall be prepared in accordance with the following requirements:

(a) A suitable title for the order or proclamation shall be provided.

(b) The authority under which the order or proclamation is promulgated shall be cited in the body thereof.

(c) Punctuation, capitalization, orthography, and other matters of style shall conform to the most recent edition of the Style Manual of the United States Government Printing Office.

(d) The spelling of geographic names shall conform to the most recent official decisions made pursuant to Executive Orders No. 27-A, of September 4, 1890, No. 399, of January 23, 1906, and No. 6680, of April 16, 1934.

(e) Descriptions of tracts of lands shall conform, so far as practicable, with the most recent edition of the Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations, published by the Federal Board of Surveys and Maps.

(f) Proposed Executive orders and proclamations shall be typewritten on paper approximately 8 by 12½ inches, shall have a left-hand margin of approximately 2 inches and a right-hand margin of approximately 1 inch, and shall be double-spaced, except that quotations, tabulations, or descriptions of land may be single-spaced.

2. The proposed Executive order or proclamation shall first be submitted to the Director of the Bureau of the

Budget. If the Director of the Bureau of the Budget approves it, he shall transmit it to the Attorney General for his consideration as to both form and legality. If the Attorney General approves it, he shall transmit it to the Director of the Division of the Federal Register, the National Archives. If it conforms to the requirements of paragraph 1 hereof, the Director of the Division of the Federal Register shall transmit it and three copies thereof to the President. If it is disapproved by the Director of the Bureau of the Budget or the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by the statement of the reasons for such disapproval.

3. If the order or proclamation is signed by the President, the original and two copies thereof shall be forwarded to the Director of the Division of the Federal Register for appropriate action in conformity with the provisions of the Federal Register Act; Provided, however, That the seal of the United States shall be affixed to the originals of all proclamations prior to such forwarding. The Division of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations the following notation, to be signed by the Director or by some person authorized by him; "Certified to be a true copy of the original." The Division of the Federal Register shall number and shall supervise the promulgation, publication, and distribution of all Executive orders and proclamations.

4. The Division of the Federal Register shall cause a limited number of copies of the Executive orders and proclamations not required or authorized to be filed and published under the provisions of the Federal Register

Act to be made available in slip form to the appropriate agencies of the Government.

5. The Division of the Federal Register shall file in the National Archives the originals of all Executive orders and proclamations.

6. The signed originals and copies of all Executive orders and proclamations heretofore promulgated and now in the custody of the Department of State shall be transferred to the National Archives.

7. Nothing in this order shall be construed to apply to treaties, conventions, protocols, and other international agreements, or proclamations thereof by the President.

8. This order shall become effective on March 12, 1936, and shall thereupon supersede Executive Order No. 6247, of August 10, 1933.

FRANKLIN D. ROOSEVELT.

The White House,
February 18, 1936.

306. *Administrative Committee, members and officers; Rules and Regulations; Scope.*—There is established a permanent Administrative Committee of three members consisting of the Archivist or Acting Archivist, who shall be chairman, an officer of the Department of Justice designated by the Attorney General and the Public Printer or Acting Public Printer. The Director of the Division shall act as secretary of the committee. The committee shall prescribe, with the approval of the President, regulations for carrying out the provisions of this Act (chapter). Such regulations shall provide, among other things; (a) The manner of certification of copies required to be certified under section 2, (sec. 302 of this title), which certification may be permitted to be based upon confirmed

communications from outside of the District of Columbia; (b) the documents which shall be authorized pursuant to section 5(b) (305 b of this title) to be published in the Federal Register; (c) the manner and form in which the Federal Register shall be printed, reprinted, compiled, indexed, bound and distributed; (d) the number of copies of the Federal Register which shall be printed, reprinted and compiled, the number which shall be distributed without charge to Members of Congress, officers and employees of the United States, or any Federal agency for their official use, and the number which shall be available for distribution to the public; and (e) the prices to be charged for individual copies of, and subscriptions to, the Federal Register and reprints and bound volumes thereof. (July 26, 1935, c. 417 sec. 6, 49 Stat. 501).

307. *Filing of documents as notice thereof; presumption created by publication; judicially noticed; how cited.*—No document required under section 5 (a) (305(a) of this title) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 2, (302 of this title), and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 5 (305 of this title), shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed or promulgated; (b) that it was duly

filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and (d) that all requirements of this Act (chapter) and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number. (July 26, 1935, c. 417, sec. 7, 49 Stat. 502.)

308. *Notice by publication to include United States; requirements.*—Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by or under an Act of Congress, or may otherwise properly be given, the notice shall be deemed to have been duly given to all persons residing within the continental United States (not including Alaska), except in cases where notice by publication is insufficient in law, if said notice shall be published in the Federal Register at such time that the period between the publication and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be (a) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of the Congress; or (b) not less than fifteen days when no time for publication is specifically prescribed by the Act, without prejudice, however, to the effectiveness of any notice of less than fifteen days where such shorter period is reasonable. (July 26, 1935, c. 417, sec. 8, 49 Stat. 502.)

309. *Payments into Treasury as miscellaneous receipts; appropriation; free use of mails; foreign mailing.*—Every payment made for the Federal Register shall be covered into the Treasury as a miscellaneous receipt. The cost of

printing, reprinting, wrapping, binding, and distributing the Federal Register and any other expenses incurred by the Government Printing Office in carrying out the duties placed upon it by this Act (chapter) shall be borne by the appropriations to the Government Printing Office and such appropriations are hereby made available, and are authorized to be increased by such additional sums as are necessary for such purposes, such increases to be based upon estimates submitted by the Public Printer. The purposes for which appropriations are available and are authorized to be made under section 10 of the Act entitled "An Act to establish a National Archives of the United States Government, and for other purposes" (48 Stat. 1122) (40:240) are enlarged to cover the additional duties placed upon the National Archives Establishment by the provisions of this Act (chapter). Copies of the Federal Register mailed by the Government shall be entitled to the free use of the United States mails in the same manner as the official mail of the executive departments of the Government. The cost of mailing the Federal Register to officers and employees of Federal agencies in foreign countries shall be borne by the respective agencies. (July 26, 1935, c. 417, sec. 9, 49 Stat. 502.)

310. *Effective dates; limitations.*—The provisions of section 2 (sec. 302 of this title) shall become effective sixty days after the date of approval of this Act (July 26, 1935), and the publication of the Federal Register shall begin within three business days thereafter, Provided, That the appropriations involved have been increased as required by section 9 of this Act (sec. 309 of this title), to be published in the Federal Register shall not be operative as to any document issued, prescribed or promulgated prior to the date when such document is first required by this

(chapter) or subsequent Act of the Congress or by Executive order to be published in the Federal Register. (July 26, 1935, c. 417, sec. 10, 49 Stat. 503.)

310(a). *Increased appropriation, availability.*—The provisions of section 2 of the Federal Register Act (sec. 302 of this title) shall become effective thirty days after said appropriations become available and the publication of the Federal Register shall begin within two business days thereafter. (Feb. 11, 1936, c. 49, Title I, 49 Stat. 1110.)

311. *Prior documents, supplemental publication.*—Within six months after the approval of this Act (July 26, 1935) each agency shall prepare and file with the committee a complete compilation of all documents which have been issued or promulgated prior to the date documents are required or authorized by this Act (chapter) to be published in the Federal Register and which are still in force and effect, and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities. The committee shall within sixty days thereafter report with respect thereto to the President, who shall determine which of such documents have general applicability and legal effect, and shall authorize the publication thereof in a special or supplemental addition or issue of the Federal Register. Such special or supplemental editions or issues shall be distributed in the same manner as regular editions or issues, and shall be included in the bound volumes of the Federal Register as supplements thereto. (July 26, 1935, c. 417, sec. 11, 49 Stat. 503.)

Section 307 this title does not apply to compilation referred to in this section and does not affect validity and constructive notice of documents already issued which may or may not be included in compilations.

312. *Documents not Included.*—Nothing in this Act (chapter) shall be construed to apply to treaties, conventions, protocols, and other International Agreements or proclamations thereof by the President. (July 26th, 1935, c. 417, sec. 12, 49 Stat. 503.)

313. *Conflicting Acts Repealed.*—All Acts or parts of Acts in conflict with this Act (chapter) are hereby repealed in so far as they conflict herewith. (July 26, 1935, c. 417, sec. 13, 49 Stat. 503.)

314. *Short Title.*—This Act (chapter) may be cited as the (Federal Register Act). (July 26, 1935, c. 417, sec. 14, 49 Stat. 503.)

O. P. A. REGULATIONS

Section 5.1. *Purposes of Article V.* (*a*) *Generally.* Article V establishes maximum prices for sales of packaged (but not bulk) distilled spirits and wine by the following persons: (1) Wholesalers, as defined in section 7.12; (3) Monopoly states, as defined in section 7.12 and (4) Primary Distributing Agents, as defined in section 7.12.

(c) *Prior regulations, orders and interpretations superseded.*—Except as otherwise provided in this regulation, Article V supersedes all other maximum price regulations, orders and interpretations issued by the Office of Price Administration before August 14th, 1943, with respect to sales of packaged, imported and domestic distilled spirits or wines by any wholesaler, retailer, monopoly state, or primary distributing agent, including the applicable provisions of the following:

(1) The general maximum price regulation;

(2) Maximum Price Regulation Number 193, as amended;

(3) Orders No. 1 through 5 inclusive under Maximum Price Regulation No. 193;

(4) Article 2 of Revised Supplementary Regulation No. 14;

(5) Section 2.3 (b) of Section 1499.26 of Revised Supplementary Regulation No. 1;

Provided, that such maximum price regulations, orders and interpretations shall remain in effect with respect to a particular sale of packaged distilled spirits or wine by any such person until provisions of this article become applicable thereto.

Section 5.2. *General Rules for Figuring Maximum Prices.* (a) *When Maximum Prices are to be Figured.*— Each wholesaler, retailer, monopoly state and primary distributing agent must figure a maximum price for any item to be sold on and after August 14th, 1943, as follows:

1. *Items in stock at the close of business on August 9, 1943.* Initial maximum prices for each item in stock at the close of business on August 9, 1943, must be figured between August 14th, 1943, and August 30, 1943, and will apply to all sales, offers to sell and deliveries of the item made on and after August 30, 1943, unless applicability of such prices to certain sales is delayed by provisions of section 5.10, permitting compliance with state price posting or listing requirements and practices. Until the initial maximum prices for such items become applicable, a wholesaler, retailer, monopoly state and primary distributing agent may continue to sell, offer for sale or delivery, those items at maximum prices established under regulations and orders of the Office of Price Administration in effect prior to the issuance of this article.

2. *Items not in stock at the close of business on August 9, 1943.* Initial maximum prices for each item not in stock at the close of business August 9, 1943, are to be

figured and made applicable before any sale, offer to sell or delivery of the item is made. No wholesaler, retailer, monopoly state or primary distributing agent shall sell, offer for sale, or deliver any item not in stock at the close of business on August 9, 1943, until after establishing initial maximum prices for the item in accordance with this article.

3. *Refiguring maximum prices.* A wholesaler, retailer, monopoly state or primary distributing agent must refigure a maximum price for an item in accordance with this article if cost for the item changes after the maximum price has been established.

(b) *Figuring maximum prices for each item separately.* Each item of packaged distilled spirits or wine to be sold or offered for sale by a wholesaler, retailer, monopoly state, or primary distributing agent after August 29, 1943, must have a separate maximum price. An "item" is a particular brand name, container size, type, designation or formula of distilled spirits or wine. One item must not be considered the same as another if there is any difference in (1) their brand names, or (2) their countries of origin, or (3) the names of their processors, or (4) their container sizes (quarts as compared with fifths, pints as compared with half-pints, etc.,) or (5) requirements of United States labeling laws or regulations applicable to each or in material information contained on their labels. Age, proof, alcoholic content, type designation, vintage and ingredients, as stated on the labels shall be deemed material information.

(c) *Customer classifications.* (1) Each wholesaler, retailer, and primary distributing agent must establish a separate maximum price for each item to each class of his customers he sells as follows:

(i) *For wholesalers.* Customers are to be classified as retailers, consumers, wholesale or monopoly states.

(ii) *For retailers.* Customers are to be classified as consumers or retailers.

(d) *Discounts, allowances, price differentials and terms of sale.* (1) Customary discounts in effect during March, 1942, in accordance with a wholesalers', retailers' or a primary distributing agents' March, 1942, customer classifications, must be applied to his maximum prices established under this article; provided, that discounts and allowances based solely on quantity purchases (in dollars or units) need not be maintained.

(2) If a wholesaler, retailer, or primary distributing agent makes his terms of sale to a customer more onerous than those in effect during March, 1942, for his sales to a customer of the same class, he must make a compensating reduction from his maximum price established under this article.

(e) *Wholesaler or Retailer acting as a Primary Distributing Agent with respect to certain Items only.* A wholesaler or retailer who is a primary distributing agent for certain items shall determine his maximum price for sales of those items in accordance with provisions of this article applicable to primary distributing agents. He shall determine his maximum price for sales of other items under the provisions of this article applicable to wholesalers or retailers as may be the case.

(f) *F.O.B. and Delivered Prices.*—(1) Maximum Prices established under this article for a wholesaler, retailer, or primary distributing agent are prices f.o.b. the metropolitan area of warehouse or place of business.

Sec. 5.3. *Determination of "net cost" used in figuring maximum prices for wholesalers, retailers and monopoly states.* (a) What purchases may be used to determine net cost. Except as otherwise provided in this article, a "base purchase" to be used by a wholesaler, retailer, or monopoly state to determine net cost of an item must be a purchase by him from a customary type of supply delivered by a customary means of transportation. No accommodation purchase (whether or not from a customary type of supplier) shall be used as a base purchase in determining net cost of an item. Purchases made on memorandum invoice or purchases of small quantities of an item at exceptional prices to fill a shortage are accommodation purchases. No purchase (whether or not from a customary type of supply) to fill an order of the United States or any agency thereof shall be used as the base purchase.

(b) *Elements of net cost.* The net cost to be used by a wholesaler, retailer or monopoly state, to determine a maximum price is a total of the following elements of costs actually paid by him with respect to a particular base purchase of the item to be priced.

(1) Purchase price. The suppliers selling price (not in excess of his maximum price under applicable regulation or orders of the Office of Price Administration.)

(i) Excepting any discount for prompt payment (cash discount); but

(ii) Including any amount subtracted from the suppliers' maximum price to compensate for discontinuance of a discount for prompt payment.

(2) *Freight.* Transportation charges from the supplier's point of shipment to the wholesaler's, retailer's, or mon-

opoly state's customary receiving point for the item, at the rate paid. No amount shall be included for

(i) Any transportation charges from point of shipment included in the supplier's selling price; or

(ii) Expense of hauling, drayage or handling within the metropolitan area of the shipping or receiving point; Provided, That a monopoly state may include such portion of that expense as it customarily included during March, 1942, in determining cost for purposes of mark-up.

(3) *Taxes and United States customs duties.* (i) For wholesalers and retailers. United States customs duties and United States state and local excise taxes at rates in effect on November 2, 1942, if not included in the suppliers' selling price.

Section 5.4. *Maximum Prices for wholesalers.*

(a) Generally. A wholesaler must establish his maximum prices to each class of customers as follows:

(1) For initial maximum prices—use paragraph (b).

(2) For a refigured maximum price if net cost for the item changed after August 29, 1943,—use paragraph (c).

(b) Initial maximum prices. (1) For sales to retailers. A wholesaler's initial maximum price per case to retailers shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, except from another wholesaler, multiplied by the percentage mark-up for the item being priced as follows:

(i) 1.15 for distilled spirits.

(ii) 1.25 for wine.

(iii) 1.20 for cordials, liquors and specialties.

(2) *For sales to consumers.* A wholesaler's initial maximum price per case to a consumer shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he has made no base purchase of the item since March 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, multiplied by the percentage mark-up provided in section 5.5 for sales of the same item by retailers to consumers.

A wholesaler's maximum price per case to any class of customers for an item purchased by him from another wholesaler shall not exceed the higher of

(i) His own maximum price for the item to a customer of the particular class figured according to the applicable provisions of this section, or

(ii) With respect to sales to retailers or consumers, the supplier's maximum price for a sale of the item to a customer of the particular class as stated in such notice.

Changes in maximum prices. (1) How long particular maximum prices continue in effect. A wholesaler's initial maximum prices and refigured maximum prices for an item shall apply to all his sales and offers to sell of the item so priced made prior to the data on which subsequently refigured maximum prices for sales thereof became applicable in accordance with (4) of this paragraph.

(2) When a wholesaler must refigure his maximum prices. A wholesaler who after August 29, 1943, receives a base purchase of an item shall figure his net cost therefor according to Section 5.3. If such net cost per case differs from the net cost per case for the base purchase used in establishing the wholesaler's maximum prices then in effect for the item, the wholesaler may, if the

most recent purchase shows the greater total and he must, if the most recent purchase shows the lesser total, establish refigured maximum prices for the item; Provided, That is the difference in net cost is 15 cents per case or less, the wholesaler shall not establish refigured maximum prices.

(3) How a wholesaler must refigure his maximum prices. A wholesaler required or permitted by this paragraph to establish refigured maximum prices for an item shall determine such prices under paragraph (b) of this section, substituting, however, the net cost for his most recent base purchase for the net cost of his earlier base purchase.

(4) When refigured maximum prices become applicable. His refigured maximum prices determined under this paragraph shall apply to stock on hand and shall be the wholesaler's maximum prices for sales of the item on and after, but not before, the 4th day (exclusive of Sundays and holidays) following receipt of the base purchase to be used to establish such refigured maximum prices, until in turn superseded by other refigured maximum prices subsequently determined; Provided, That until on and after the earliest effective date for prices posted or listed at the first opportunity after the 4th day (exclusive of Sundays and holidays) after receipt of such base purchase, refigured maximum prices shall not apply to any sale which a wholesaler is required by statute, ordinance or regulation to make at a price posted or listed with a state or other public authority before receipt of the base purchase.

Section 5.5. *Maximum prices for retailers.* (Note) A retailer who is the processor or primary distributing agent of an item must not use this Section to determine maxi-

mum prices for that item unless permitted to do so by provisions of this regulation establishing maximum prices for processors or primary distributing agents.

(a) Generally. A retailer must establish his maximum prices to each class of customers as follows:

(1) For initial maximum prices—use paragraph (b).

(2) For a refigured maximum price if net cost for the item changes after August 29, 1943, use paragraph (c).

(b) Initial maximum prices.—(1) For sales to consumers. A retailer's initial maximum price per case to consumers shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, multiplied by the percentage markup for the item being priced as follows:

(i) 1.333 for distilled spirits.

(ii) 1.50 for wine.

(iii) 1.45 for cordials, liqueurs and specialties.

(2) For sales to another retailer. A retailer's initial maximum price per case to another retailer shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier. No mark-up shall be added for such sales.

(Note) A base purchase made between August 9, 1943, and August 30, 1943, may be used to figure initial maximum

prices. A retailer is not required to establish a refigured maximum price for an item until he makes a base purchase thereof after August 29, 1943.

(c) *Changes in maximum prices.*—(1) How long particular maximum prices continue in effect. A retailer's initial maximum prices and refigured maximum prices for an item shall apply to all his sales and offers to sell of the item so priced made prior to the date on which subsequently refigured maximum prices for sales thereof become applicable in accordance with (4) of this paragraph.

(2) *When a retailer must refigure his maximum prices.* A retailer who after August 29, 1943, receives a base purchase of an item shall figure his net cost therefor according to section 5.3 If such net cost per case differs from the net cost per case for the base purchase used in establishing the retailer's maximum prices then in effect for the item, the retailer may, if the most recent purchase shows the greater total and he must, if the most recent purchase shows the lesser total, establish refigured maximum prices for the item; Provided, That if the difference in net cost is 15 cents per case or less, the retailer shall not establish refigured maximum prices.

(3) *How a retailer must refigure his maximum prices.* A retailer required or permitted by this paragraph to establish refigured maximum prices for an item shall determine such prices under paragraph (b) of this section, substituting however, the net cost for his most recent base purchase for the net cost of his earlier base purchase.

(4) *When refigured maximum prices become applicable.* His refigured maximum prices determined under this paragraph shall apply to stock on hand and shall be the retailer's maximum prices for sales of the item on and

after but not before, the 4th day (exclusive of Sundays and holidays) following receipt of the base purchase to be used to establish such refigured maximum prices, until in turn superseded by other refigured maximum prices subsequently determined; Provided, That until on and after the earliest effective date for prices posted or listed at the first opportunity after the 4th day (exclusive of Sundays and holidays) after receipt of such base purchase, refigured maximum prices shall not apply to any sale which a retailer is required by statute, ordinance or regulation to make at a price posted or listed with a state or other public authority before receipt of the base purchase.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 345

PAUL WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 182–188) has not yet been reported. The opinion of the district court appears at pages 169–172 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 11, 1945 (R. 181), and a petition for rehearing was denied July 23, 1945 (R. 209). The petition for a writ of certiorari was filed August 20, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction under count 1 for carrying on the business of a wholesale liquor dealer without having paid the special tax required by law.

2. Whether there was a ceiling price applicable to the sales made by petitioner which form the basis of counts 3 and 4 of the indictment.

3. Whether the Twenty-first Amendment to the Constitution precludes the establishment of maximum prices for sales of alcoholic beverages under the Emergency Price Control Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved appear in the Appendix, *infra*, pp. 9–12.

STATEMENT

Petitioner was convicted by the court without a jury on counts 1, 3, 4 and 6 of a six-count indictment returned against him in the United States District Court for the Eastern District of Kentucky (R. 11–15, 16, 171). Count 1 charged that between February 14 and 22, 1944, petitioner carried on the business of a wholesale liquor dealer at Sharp's Tourist Court, Middlesboro,

Kentucky, without having paid the special tax required by law (R. 11). Counts 3, 4 and 6 charged violations of the Emergency Price Control Act by sales of liquor above ceiling prices at Sharp's Court and Wallsend, Kentucky (R. 12–13, 14–15). Petitioner was sentenced to imprisonment for one year and to pay a fine of $5,000 on each of counts 3 and 4, the sentences to run consecutively. He was sentenced to imprisonment for two years and to pay a fine of $2,000 on count 1 and to imprisonment for one year on count 6, the latter sentence to run concurrently with that imposed on count 1. Execution of the prison sentence on counts 1 and 6 was suspended and petitioner was placed on probation for five years, provided that he pay the fines imposed against him within a period of two years (R. 39–40). On appeal, the judgment was affirmed (R. 181).

The evidence for the Government may be summarized as follows:

Petitioner operated a wholesale and retail liquor business at Wallsend, Kentucky (R. 139). In January or February 1944, after Wallsend had been voted dry under local option, petitioner leased Sharp's Tourist Court in Middlesboro, Kentucky, including a retail liquor store operated there (R. 140–142, 146, 153). He received a state liquor license for the Sharp's Court store on February 29, 1944 (R. 141), and a federal stamp on April 1, 1944 (R. 133).

On February 14, 1944, Barrett and Dolen, two dealers in illicit liquor who worked together (R. 86), purchased a case of Paul Jones Whiskey from petitioner at Sharp's Tourist Court, paying petitioner $90 in cash for the case (R. 76–77, 106, 111). Petitioner told them that he had two more cases at his Wallsend store, but when they arrived there they found that one case had been disposed of. They purchased the remaining case from petitioner's clerk for $90 in cash (R. 77–78, 111–112). The maximum retail price for Paul Jones whiskey under O. P. A. regulations was $45.95 and the wholesale price approximately 25 percent less (R. 101). These sales form the basis of counts 3 and 4 of the indictment.

On February 20, 1944, these same men purchased from petitioner at Sharp's Tourist Court two cases of Rocking Chair and one case of Spring Hill whiskey. They paid petitioner in cash at the rate of $72.50 and $75.00 a case, respectively (R. 79–80, 107, 113). Petitioner removed the serial numbers from the three cases of whiskey before delivering them (R. 109–110, 117). The maximum price for such liquor was $36.00 at retail and 25 percent less at wholesale (R. 102).

On February 21, 1944, when an investigator of the Alcohol Tax Unit called at the Sharp's Court store, he found petitioner behind a counter, apparently in charge (R. 94, 98). When petitioner was asked whether that was his place of business,

he stated that he could not openly take charge because he had not yet received a state license (R. 94, 97, 99). This sale forms the basis of count 6 and is one of the elements of proof of count 1.

ARGUMENT

1. Petitioner contends (Pet. 4, 6, 10, 11–13) that the evidence is insufficient to support his conviction on count 1 for carrying on the business of a wholesale liquor dealer at Sharp's Court because there was proof of only one sale of more than five gallons at such location, i. e., the sale of February 20, 1944 (see Statement, *supra*). However, as the court below pointed out (R. 184), evidence to establish the offense charged need not necessarily show more than a single sale where there are corroborating circumstances supporting the conclusion that defendant was engaged in the wholesale liquor business as a dealer. *Bailey* v. *United States*, 259 Fed. 88, 92 (C. C. A. 6); *Sodini* v. *United States*, 261 Fed. 913, 914 (C. C. A. 6); *Johnson* v. *United States*, 84 F. 2d 114, 115 (C. C. A. 5). In fact, a conviction under this statute has been sustained although no sales of more than five gallons were actually consummated. *Taran* v. *United States*, 88 F. 2d 54, 58 (C. C. A. 8). The circumstances that petitioner had previously been engaged in the wholesale liquor business, that he appeared to be in charge of the Sharp's Court store during February, that there

was a substantial amount of liquor on hand when petitioner took charge of the store openly on March 1, 1944 (R. 147), all justified the trier of facts in concluding that the sale of February 20, 1944, was not an isolated transaction, but part of petitioner's business as a wholesale liquor dealer.

2. Petitioner argues (Pet. 4–5, 7, 10, 14–16) that before May 2, 1944, when the Office of Price Administration amended Maximum Price Regulation 445, fixing ceiling prices for liquor, to provide by Amendment 15 that persons acting as finders were to be considered agents of the seller, it was legitimate for retailers to pay finders' fees and to add such fees in determining the retail ceiling price; that since the witness from the Office of Price Administration who testified as to ceiling prices did not consider finders' fees, there was no proof that the sales which form the basis of counts 3 and 4 were made at prices above ceiling. The argument is obviously without merit. Section 5.3 of Maximum Price Regulation 445, *infra*, pp. 10–11, specifically fixes the elements of net cost from which the retail ceiling price is determined as the "supplier's" selling price, not in excess of his ceiling price, freight charges, and taxes. Manifestly, even if a retailer were willing to pay a finders' fee, and there is no proof in this case that petitioner did so, he would not be entitled to consider such fee as an element in determining his ceiling price.

at the Twenty-first Amend-
leral government from fix-
or liquor under the Emer-
Act (Pet. 6, 10, 16–22) is
That Amendment did not
liquor a special immunity
alidly exercised in further-
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324 U. S. 293, 299; *Jameson*
7 U. S. 171, 172–173; *Taub* v.
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3. The contention th
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Term; *Jatros* v. *Bo*
(C. C. A. 6).[1]

[1] Petitioner contends (Pet. 5–6, 7–8, 10–11, 23) that his conviction should be reversed because one Floyd pleaded guilty to selling the same liquor (Rocking Chair and Spring Hill) petitioner was charged with selling in counts 1 and 6. The testimony of Barrett and Dolen that they had bought the liquor from petitioner was unequivocal (*supra*, p. 4). In addition it should be noted that counts 1 and 9 of the indictment to which Floyd pleaded guilty mentioned a number of cases of whiskey of brands other than Spring Hill and Rocking Chair (R. 30–31, 35–36), and that both Barrett and Dolen testified that they had purchased liquor from petitioner on the night of February 20 and that, at the time of their arrest, they were transporting liquor obtained from persons other than petitioner (R. 80–82, 90, 93, 114).

CONCLUSION

The decision below is correct; it presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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Attorneys.

SEPTEMBER 1945.

APPENDIX

The pertinent provisions of the Internal Revenue Code, as amended (26 U. S. C.), are:

> SEC. 3250. *Tax*—(a) *Wholesale dealers in liquors.*
>
> (1) *In general.*—Wholesale dealers in liquors shall pay a special tax of $110.
>
> * * * * *
>
> SEC. 3253. *Penalties and forfeitures for nonpayment of special tax.*
>
> Any person who shall carry on the business of a * * * wholesale liquor dealer, * * * and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *
>
> SEC. 3254. (b) *Wholesale dealer in liquors.*
>
> Except as otherwise provided, every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquors: * * *

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or com-

modities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. * * * (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Maximum Price Regulation No. 445, effective August 14, 1943 (8 F. R. 11161), provides in pertinent part as follows:

SEC. 5.3. *Determination of "net cost" used in figuring maximum prices for wholesalers, retailers and monopoly states.* * * *

(b) *Elements of net cost.* The net cost to be used by a wholesaler, retailer or monopoly state to determine a maximum price is the total of the following elements of cost actually paid by him with respect to a particular base purchase of the item to be priced:

(1) *Purchase price.* The supplier's selling price (not in excess of his maximum price under applicable regulations or orders of the Office of Price Administration.)

(i) Excepting any discount for prompt payment (cash discount); but

(ii) Including any amount subtracted from the supplier's maximum price to compensate for discontinuance of a discount for prompt payment.

(2) *Freight.* Transportation charges from the supplier's point of shipment to the wholesaler's, retailer's, or monopoly state's customary receiving point for the item, at the rate paid. No amount shall be included for

(i) Any transportation charges from point of shipment included in the supplier's selling price; or

(ii) Expense of hauling, drayage or handling within the metropolitan area of the shipping or receiving point: *Provided,* That a monopoly state may include such portion of that expense as it customarily included during March 1942 in determining cost for purposes of mark-up.

(3) *Taxes and United States customs duties*—(i) *For wholesalers and retailers.* United States customs duties and United States state and local excise taxes at rates in effect on November 2, 1942, if not included in the supplier's selling price.

SECTION 5.5. *Maximum prices for retailers.* * * *

(b) *Initial maximum prices*—(1) *For sales to consumers.* A retailer's initial maximum price per case to consumers shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item since March 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item

from any supplier, multiplied by the percentage mark-up for the item being priced as follows:

(i) 1.333 for distilled spirits.

(ii) 1.50 for wine.

(iii) 1.45 for cordials, liqueurs and specialties.

* * * * *

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